# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 16, 2014 |
| v | Nos. 308502, 314314<br>Wayne Circuit Court |
| RODERICK BRETT GRAHAM,<br><br>Defendant-Appellant. | LC No. 11-007871-FH |

Before: SAAD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of second-degree home invasion, MCL 750.110a(3). He was sentenced as a fourth habitual offender, MCL 769.12, to serve four to fifteen years in prison. We affirm.

## I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant was initially charged with attempted first-degree home invasion. He waived his preliminary examination and the charge was reduced to attempted second degree home invasion. At the calendar conference, the prosecution offered defendant an agreement to plead guilty to attempted second degree home invasion with a one to five year prison term. The prosecution noted for the record that, in a telephone discussion with the victim, the victim said that he saw defendant "half in and half out" of his house. If defendant did not accept the plea agreement, the prosecution sought to amend the information to first- or second-degree home invasion. Defendant did not accept the plea and the matter was remanded to the district court for a preliminary examination on the new charge. Thereafter, defendant was bound over on the charge of second-degree home invasion.

At trial, the complaining witness, Carlos Lane, testified that he lived at 4014 Balfour in Detroit. On July 26, 2011, he left his home at 5:00 or 6:00 p.m. At the time, his doors and windows were locked and the windows on his side bay window and back bedrooms were boarded up. He previously had some work done on his home and left the boards up afterward because he worked as an over-the-road truck driver and was often gone for long periods of time.

That night, Lane received a telephone call a little before 2:00 a.m. from a neighbor telling him that his window was broken. He went right home; it took him 10 to 20 minutes to get there. He cut off the engine to his motorcycle early and coasted down his neighbor's driveway all the

way to her garage. Lane's neighbor had a big spotlight on her garage that lit up both of their backyards. As Lane drove up the driveway, he looked toward his house and saw defendant halfway in and halfway out of his bedroom window. Defendant backed out of the window and looked at Lane. Defendant's shoulders to head were in the window as well as his hands.

Lane grabbed his pistol and told defendant to get down. Lane held defendant until police arrived. During that time, defendant told Lane, "I didn't do it, I didn't break in. It was like that when I got here. I looked in and all I do is steal copper pipes. That's all I wanted." Defendant did not have anything in his hands or any tools although there was a flashlight on the window ledge. Lane saw that the board covering his back bedroom window had been removed, the frame had been removed and set aside and the glass was broken. There was nothing missing from Lane's home. Shortly thereafter, the police arrived and took defendant away.

In a statement to police, defendant explained that he went to 4014 Balfour because he thought it was vacant and he was going to go inside for scrap metals. Although the back of the home and sides were boarded up, the window where he was discovered was not boarded up. Defendant was using his flashlight to look inside and claimed that "All I did was look in the window."

The jury found defendant guilty of second-degree home invasion. Defendant was originally sentenced to serve five to fifteen years in prison. In Docket No. 308502, defendant moved for a remand to the trial court, arguing his sentence was inappropriate because Offense Variable (OV) 13 was improperly scored 10 points. This Court remanded the matter for the trial court to resentence defendant, if appropriate, and retained jurisdiction. *People v Graham*, unpublished order of the Court of Appeals, entered October 3, 2012 (Docket No. 308502). On remand, the trial court determined that defendant had not committed three or more crimes within a five-year period, rescored OV 13 at zero, and resentenced defendant within the corrected guidelines. The issue is, therefore, resolved, and defendant received the relief requested in Docket No. 308502.

Defendant now appeals his conviction and sentence in Docket No. 314314, filing both an appellate brief and a Standard 4 brief.

## II. SUFFICIENCY OF THE EVIDENCE

In his appellate brief, defendant argues that there was insufficient evidence of entry into the home for a conviction of second-degree home invasion. We disagree.

"This Court reviews de novo defendant's challenge to the sufficiency of the evidence." *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). The evidence is reviewed in a light most favorable to the prosecution to determine whether a trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

Under MCL 750.110a(3) "a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling . . . is guilty of home invasion in the second degree." To establish entry, it is sufficient if any part of the defendant's body enters the home; even sticking an arm through a window would be entry. *People v Gillman*, 66 Mich App

419, 429-430; 239 NW2d 396 (1976). The homeowner testified that he saw defendant halfway into his house, with his head, shoulders, and hands inside the window. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to establish defendant's entry into the home.

Defendant argues that the homeowner's testimony was not credible because he did not tell police at the scene or at the precinct the next day that defendant's head, shoulders, and hands were inside his home. However, "[i]t is the jury's task to weigh the evidence and decide which testimony to believe. All conflicts in the evidence must be resolved in favor of the prosecution[.]" *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008) (citations omitted). Defense counsel attempted to impeach the homeowner with inconsistencies in his statements regarding entry into the home, but the jury nevertheless determined that entry was established beyond a reasonable doubt. This Court "will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *Id.*

## III. DUE PROCESS CLAIM

In his Standard 4 brief, defendant argues that he waived his right to a preliminary examination in exchange for a reduction in the charged offense to attempted second-degree home invasion. However, the prosecutor later reneged on the deal and the matter was subsequently remanded to the district court for a new preliminary examination at which time defendant was bound over on the charge of second-degree home invasion. Defendant maintains that this was a violation of his due process rights. The record does not support defendant's allegations.

This Court reviews de novo constitutional due process claims. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

A defendant has a statutory right, and not a constitutional right, to a preliminary examination. *People v Hall*, 435 Mich 599, 603; 460 NW2d 520 (1990). However, it has long been accepted practice that a defendant may waive that right. MCR 6.110(A).

The record in this matter reveals only that defendant waived his right to a preliminary examination and that the charge was reduced from first-degree home invasion to attempted second-degree home invasion. Defendant claims that the homeowner was not present at the initial preliminary examination and, therefore, the prosecutor offered defendant an agreement to reduce the charge if he waived the preliminary examination, but there is no record support for defendant's claims. Further, at the calendar conference, defense counsel stated that the charge was reduced because the prosecutor did not believe that the evidence established first-degree home invasion and that defendant waived his preliminary examination, not that there was an agreement to waive if the prosecution reduced the charge.

Any agreement between parties must be in writing or made in open court. MCR 2.507(F); *People v Mooradian*, 221 Mich App 316, 319; 561 NW2d 495 (1997). This agreement was not in writing, and there is no record of it having been made in open court.

Further, a prosecutor is given broad discretion to decide what charges to bring against a defendant. *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999). The prosecutor had the right to amend the information before, during, or after trial unless amendment would unfairly

surprise or prejudice the defendant. MCR 6.112(H). Here, the prosecution stated that it wished to amend the charges because it received further information from Lane. The matter was remanded to the district court for a new preliminary examination on the amended charge and, therefore, defendant was not unfairly surprised or prejudiced by the amendment.

## IV. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant argues that his trial counsel and appellate counsel were ineffective in several ways.

Where the issue of ineffective assistance of counsel is unpreserved, this Court's review is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). This Court reviews unpreserved constitutional errors for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was sound trial strategy. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prove that defense counsel was not effective, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, (2) there is a reasonable possibility that counsel's deficient performance prejudiced the defendant, and (3) but for counsel's errors, the result of the proceedings would have been different. *Strickland*, 466 US at 694; *People v Pickens*, 446 Mich 298, 302-303, 312; 521 NW2d 797 (1994).

The test for ineffective assistance of appellate counsel is the same as the test for ineffective assistance of trial counsel. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008).

### A. TRIAL COUNSEL'S FAILURE TO OBJECT TO AMENDED CHARGES

Defendant first argues that trial counsel was ineffective for failing to object to the prosecution's request to amend the charges after an agreement to reduce charges to attempted second-degree home invasion. The record does not support defendant's contention.

First, trial counsel did object to the request for a remand to the district court. Second, there is no agreement on the record. In fact, the record supports the opposite — the prosecution amended charges to reflect the evidence and defendant waived his preliminary examination, but the two actions were not dependent on each other. Again, a prosecutor may amend the information before, during, or after trial unless amendment would unfairly surprise or prejudice the defendant. MCR 6.112(H). Here, the prosecution indicated that it wished to amend the charges because it received further information from Lane. The matter was remanded to the district court for a new preliminary examination on the amended charge and, therefore, defendant was not unfairly surprised or prejudiced by the amendment. Defense counsel objected to the remand, arguing that the evidence did not support first-degree or second-degree home invasion, but the trial court correctly remanded the matter for a new preliminary examination.

### B. TRIAL COUNSEL'S FAILURE TO OBJECT TO PROSECUTORIAL MISCONDUCT

Next, defendant argues that this trial counsel was ineffective for failing to object to prosecutorial misconduct in "coaching" a witness. The record does not support defendant's contention.

A prosecutor must not present testimony he knows to be false. *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). However, there is no record evidence that the prosecution knew the complaining witness's testimony was false. See *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). It is likely that the prosecutor, in talking to the complaining witness, asked whether part of defendant's body was in the window or clarified what the witness meant when he said that it looked like defendant had just climbed out of the window. Defendant has not established prosecutorial misconduct on this record. Defense counsel cross-examined the complaining witness thoroughly on this subject and counsel's failure to make a frivolous objection does not establish ineffective assistance. *People v Hardy*, 494 Mich 430, 445; 835 NW2d 340 (2013).

C. TRIAL COUNSEL'S FAILURE TO OBJECT TO A NEW WARRANT

Defendant next argues that his trial counsel was ineffective at the second preliminary examination when she failed to object to the prosecution proceeding without a new warrant and without dropping the attempted first-degree home invasion charge. The record does not support defendant's contention.

The record of the preliminary hearing reveals that defense counsel objected to the second preliminary examination, and the district court would not proceed on the new charges without a written complaint. After a brief recess, the prosecutor submitted an amended information with the alternate charges of first-degree and second-degree home invasion, and the prosecutor stated that he was dismissing the attempted second-degree home invasion charge. On the record before this Court, there is no evidence that trial counsel was ineffective in any way at the second preliminary examination.

D. APPELLATE COUNSEL'S FAILURE TO RAISE AN INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM

Defendant next argues that his appellate counsel was ineffective for failing to raise an ineffective assistance of trial counsel claim. We disagree. As already discussed, on the record before this Court, trial counsel was not ineffective. Appellate counsel is not ineffective for failing to raise a meritless argument on appeal. *Hardy*, 494 Mich at 445.

E. APPELLATE COUNSEL'S FAILURE TO MEET WITH DEFENDANT

Defendant also argues that appellate counsel was ineffective for failing to confer with defendant. We disagree. Defendant attached to his Standard 4 brief a copy of two letters from appellate counsel revealing that appellate counsel met with defendant at the prison, reviewed defendant's arguments and support thereof, and assisted defendant in filing his Standard 4 brief. There is no evidence that appellate counsel was negligent in conferring with defendant.

F. APPELLATE COUNSEL'S FAILURE TO RAISE A SUFFICIENCY OF THE EVIDENCE ARGUMENT

Finally, defendant argues that his appellate counsel was ineffective for failing to argue that there was insufficient evidence of larceny. We disagree.

To establish ineffective assistance of appellate counsel, defendant must overcome the presumption that appellate counsel's decision regarding which claims to pursue was sound appellate strategy. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To review a challenge to the sufficiency of the evidence, the evidence is reviewed in a light most favorable to the prosecution to determine whether a trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Reese*, 491 Mich at 139.

As previously stated, MCL 750.110a(3) provides that "a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling . . . is guilty of home invasion in the second degree." Defendant argues that there was insufficient evidence of his intent to commit larceny. The elements of larceny are "(1) [a]ctual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with felonious intent, (4) the taking away must be without the consent and against the will of the owner." *Cain*, 238 Mich App at 120, quoting *People v Anderson*, 7 Mich App 513, 516; 152 NW2d 40 (1967). The specific intent necessary to commit larceny is the intent to steal another's property. *Cain*, 238 Mich App at 120. When confronted by Lane, defendant said that he was just looking in the house and "all he does is steal copper pipes." Defendant also told police that he thought the house was vacant and that he was intending to take scrap metals. Thus, there was sufficient evidence that defendant intended to steal scrap metal from the house when he entered the dwelling.

Defendant further argues that he only intended to commit a misdemeanor when he looked inside the house. However, MCL 750.110a(3) lists "intent to commit a felony, larceny, *or* assault in the dwelling." Because the items are listed in the alternative, defendant was not required to intend to commit felony larceny when he entered the house; any type of larceny qualifies under the statute.

Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to establish intent to commit larceny where defendant admitted that he was at the house to steal metal pipes, and no felonious intent was required to commit the larceny. Therefore, defendant has not established that appellate counsel was ineffective for failing to raise this claim. *Hurst*, 205 Mich App 641.

## V. TWO-THIRDS RULE

Finally, defendant argues in his Standard 4 brief that his sentence of a minimum of four years and a maximum of fifteen years violates the statutory two-thirds rule. We disagree.

"If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10).

Defendant acknowledges that the amended guidelines for his resentencing were twelve to forty-eight months. A minimum sentence of four years is equal to forty-eight months and,

therefore, is within guidelines. MCL 769.34(2)(b) provides that "[t]he court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence." The maximum sentence here was fifteen years, and two-thirds of that maximum would be ten years. Defendant received a minimum sentence of four years, which does not violate MCL 769.34(2)(b).

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly